IN THE HIGH COURT OF BOMBAY AT GOA
****

FIRST APPEAL NO. 80 OF 1998

1. Shri Shaik Abdul Karim
   Shaik Issac, major,
   businessman, r/o House
   No.MHN 289, Vadem,
   Vasco da Gama, Goa, and

2. United India Insurance
   Co. Ltd., having its
   Divisional Office at
   Mascarenhas Bldg.,
   2nd Floor, Panaji, Goa. ... Appellants.

Versus

1. Shri Ramnath Shanker
   Shirodkar, major, businessman,
   r/o House No. 121, Dikarpal-
   Navelim, Margao, Goa,

2. National Insurance Co. Ltd.,
   Marchon Bldg., lst Floor,
   Varde Valaulikar Road,
   Opp. Lohia Maidan,
   Margao, Goa,

3. Shri Shrikant Bhiku Naik,
   major, agricultural
   labourer, r/o Maddicatto-
   Cuncolim, Salcete, Goa, and

4. Smt. Anandem alias
   Bhagvantem Shrikant Naik,
   major, housewife, r/o
   Maddicatto-Cuncolim,
   Salcete, Goa. ... Respondents.

Shri E. Afonso, advocate for the appellants.

Shri J. P. Mulgaokar, advocate for respondent no.2.

Shri Sudin M. Usgaokar, advocate for respondents no.3 and 4.

CORAM: D. G. DESHPANDE, J.
DATE: 10th January, 2003.

ORAL JUDGMENT

Heard learned counsel for the appellants and respondent no.2 mainly and learned counsel for respondents

no.3 and 4.

2. On 5th January, 1993, an accident occurred between a tanker and a bus, resulting in the death of 13 persons, including the drivers of both the tanker and the bus. A number of claim petitions came to be filed arising out of the said accident and respondents no.3 and 4 in this appeal being the parents of one of the victims also filed claim petition before the Motor Accident Claims Tribunal, South Goa, Margao. The Motor Accident Claims Tribunal, South Goa, Margao, by its Order dated 3rd January, 1998, awarded compensation to the claimants, respondents no.3 and 4, but while doing so, the liability for the compensation was fastened upon the appellant no.2, United India Insurance Co. Ltd. and respondent no.2, National Insurance Co. Ltd.. Therefore, the appellant no.2 alongwith appellant no.1, who is the owner of the bus, have filed this appeal.

A preliminary objection was raised by the learned counsel for the respondent no.2 about the maintainability of this appeal, on the basis of the judgment of the Supreme Court reported in **Chinnama Goerge & Ors.** vs. **N. K. Raju & Ors.**{(2000) 4 SCC 130} and also upon another judgment of a larger Bench reported in **National Insurance Co. Ltd., Chandigarh** vs. **Nicolletta Rohtagi & Ors.** { (2002) 7 SCC 456}, to the effect that the Insurance Company has no right of appeal unless the conditions prescribed under Section 149

(2) of the Motor Vehicles Act, 1988, are attracted.

3. Against this learned counsel for the appellant relied upon another judgment of the Supreme Court in **H. S. Ahammed Hussain** vs. **Irfan Ahammed**, (2002 AIR SCW 2788), wherein the judgment in Chinnama George's case was also considered, but the right of the Insurance Company to file an appeal was considered in favour of the Insurance Company.

4. Before making a submission on merits, the learned counsel for the appellants, contended that by filing this appeal, the Insurance Company has not challenged the compensation awarded to the claimants at all. His challenge is about holding the appellant no.2 responsible for payment of compensation when, in fact, it was only respondent no.2 who should have been held liable to pay the entire amount of compensation. He clarified that the appeal is directed against only that part of the order of the Tribunal by which the compensation is required to be paid by the appellant no.2, whereas in fact the entire responsibility should have been placed upon respondent no.2.

5. In view of this clarification, in my opinion, none of the aforesaid judgments can come in the way of the appellants because the Supreme Court while considering the scope of Section 149 of the Motor Vehicles Act took into consideration the object behind the Act, vis-a-vis the

claim, but it cannot be said that the aforesaid judgment prevented the Insurance Company from challenging the Award regarding its liability beside the other Insurance Company. Therefore, the preliminary objection raised by the learned counsel for respondent no.2 is required to be rejected.

6. It needs to be clarified before understanding the submissions, that a tanker and a bus were involved in the accident. The bus was insured by the appellant no.2 and the tanker was insured by respondent no.2. While filing the application for compensation under Section 133 of the Motor Vehicles Act, the claimants, who were respondents no.3 and 4 in this appeal had repeatedly alleged that it was the negligence of the driver of the tanker that resulted in the ghastly accident killing a number of passengers. My attention was drawn in this regard by the learned counsel for the appellants to the application under Section 166 of the Motor Vehicles Act. He also drew my attention to the panchanama and the evidence of the witnesses recorded and pointed out that no where any of the claimants or witnesses had pointed their finger regarding negligence of the bus driver. He pointed out that the place where the accident took place was a bus stop. The bus was approaching the said stop when, at that time, the tanker coming at a very high altitude, dashed against the bus. According to him, the circumstances brought on record, the manner in which the accident took place and the evidence alongwith the

panchanama and other documents, clearly and conclusively prove that it was the negligence on the part of the driver of the tanker which caused the accident. He, therefore, contended that when the claimants had no where alleged negligence on the part of the driver of the bus, when the evidence also did not point an accusing finger at the driver of the bus regarding his negligence and when, on the other hand, the entire fault was that of the driver of the tanker, then under no circumstances the Tribunal was justified in fixing the liability upon the appellants.

7. As against this, it was contended by the learned counsel for the respondent no.2, that the appellant no.2 was ex parte, did not take part in the proceedings, did not cross-examine the witnesses and, therefore, the Tribunal was not justified in fixing the liability.

8. It is difficult to accept the contentions raised by the learned counsel for respondent no.2. Five witnesses appeared to have been examined in this case before the Tribunal. C.W.1 is the father of the victim, C.W. 2 is the panch and whatever evidence they have given in their examination-in-chief regarding the manner in which the accident took place, was subject to cross-examination by respondent no.2. However, from the said cross-examination, it is clear, at least from the cross-examination of C.W.1, that not a single suggestion is put to the said witnesses

about any kind of negligence on the part of the driver of the bus. So far as C.W.2 is concerned, he was a panch witness, cross-examination on behalf of respondent no.2 was declined. So far as the other witnesses, namely Dr. Jindal, C.W.3, Dr. Silvano Dias Sapeco, C.W.4, there is absolutely no cross-examination on behalf of the respondent no.2. So far as C.W.5, P. V. Kamat, who was the employer of the deceased Sanjay Naik is concerned, his cross-examination is only for the purpose of ascertaining the income or earning of the said Sanjay Naik, who was the victim of the accident.

9. It will be clear, therefore, that the claimant, right from the stage of filing the application for compensation claimed that it was the rashness and negligence of the driver of the tanker that was responsible for the accident. Respondent no.2 did not take any efforts to show or prove that the driver of the bus was also negligent in the accident or that it was a case of contributory negligence. Even if it is accepted for the sake of argument that contributory negligence was the case of respondent no.2, no effort was made to prove the case or to bring probabilities on record in that respect. Non-examination of any of the witnesses by the respondent no.2 to show negligence of the bus driver and no cross-examination of the important witnesses regarding this aspect, clearly disproves the contentions now raised by the learned counsel for

respondent no.2.

10. When, therefore, in the aforesaid background the Tribunal was required to fix the liability, it obviously committed an error in fixing the liability upon the appellant no.2. The reasons given by the Tribunal in para 6 of its judgment are absolutely wrong. The Insurance Company of the bus, i.e. appellant no.2, could not have been held liable unless it was a case of contributory negligence or unless there was something on record to show and suggest that the driver of the bus was equally negligent and responsible for the aforesaid accident. The impugned Judgment is, therefore, wrong without any basis, and therefore the Appeal is allowed. The judgment of the Tribunal is set aside in so far as it relates to appellants no.1 and 2. The amount deposited by the appellant no.2 is allowed to be withdrawn. Needless to say that respondent no.2 will pay entire compensation within six weeks from today. No costs.

D. G. DESHPANDE, J.

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